UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 02-11992-RGS

COMPUTER NETWORKS, INC.

v.

SEARS, ROEBUCK AND CO.

MEMORANDUM AND ORDER ON DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

June 10, 2004

STEARNS, D.J.

In this somewhat bizarre case, Computer Networks, Inc. (CNI), a small Andover, Massachusetts internet e-mail provider, claims that its server was deliberately infiltrated by retailing giant Sears, Roebuck and Co. (Sears). The Complaint alleges, *inter alia*, violations of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030(a)(5). It is undisputed that e-mail originating from Sears employees and customers migrated to CNI's server. There is some explanation as to how it happened. There is no explanation as to why.

BACKGROUND

David Webster[1] founded CNI as a provider of internet hosting services. CNI manages e-mail transmissions for approximately 10-15 businesses who pay a flat monthly fee of $69.95 for 100 megabytes of disk storage space, five e-mail accounts, and one dial-up account. Each of CNI's 20-25 e-mail users is assigned an address with the suffix

[1]Webster is the president of CNI, and its sole shareholder, director and officer. He was the lead engineer at Polaroid in the development of electronic identification systems for three driver's license programs. Webster was also involved in developing electronic identification systems for prison programs and the Department of Defense.

"@cnetwork.com."

Over a nine month period in 1999, CNI's server suffered repeated "crashes." Webster determined that the server's software was accepting and retaining undeliverable e-mails, instead of rejecting and returning them to the sender. Unable to resolve the problem with the vendor, Webster switched to a new, more efficient server, which he programmed to report and save undeliverable messages. Webster observed that a number of the errant messages originated from addresses containing the suffix "@sears.com" and were directed to recipients whose e-mail address incorporated the address of CNI's server. By instructing the server to reject e-mail containing the suffix "@sears.com," Webster solved the crashing problem.

In March of 2002, an attorney retained by Webster accused Sears of deliberately routing internal and external e-mail messages through CNI's server in violation of the CFAA. In response to Sears' request for proof of the allegation, on September 15, 2002, Webster's counsel provided Sears with approximately 200 pages of e-mail messages "illegally sent through my client's hosting service." On October 8, 2002, Webster filed this lawsuit.[2] In March of 2003, as discovery progressed, Webster provided an additional 1,000 pages of Sears-related messages and attachments that had dead-ended on his server between January and November of 2001. These include (a) messages where the sender is identified as having the e-mail address "@sears.com," and (b) messages where one or more of the recipients is identified as having the address "@sears.com" or

[2]In addition to the CFAA claim, the Complaint alleges trespass and conversion, nuisance, tortious interference with business relations, and a violation of the Massachusetts consumer fraud statute.

"@cnetwork.sears.com."[3]

DISCUSSION

Summary judgment is appropriate when, based upon the pleadings, affidavits, and depositions, "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Gaskell v. Harvard Co-op Soc., 3 F.3d 495, 497 (1st Cir. 1993). "There must be sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-250 (1986).

The Complaint is framed in five counts: Count I - violation of the CFAA, 18 U.S.C. § 1030 (a)(5)(C);[4] Count II – common-law trespass and conversion (Sears "intentionally, without permission appropriated the Plaintiff's server and computer resources causing the Plaintiff the loss of his server and damages"); Count III – common law nuisance; Count IV – intentional interference with advantageous business relations; and Count V – violation of G.L. c. 93A, § 11. Two of the Counts (III and V) are easily disposed of. A claim for private nuisance arises "when a property owner creates, permits, or maintains a condition or activity on his

[3]Some other of the external messages appear to have originated with Sears customers or consultants.

[4]Section 1030 provides, in pertinent part, as follows:

> (a) Whoever . . .
>
> (5)(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage; . . . shall be punished as provided in subsection (c) of this section.

property that causes a substantial and unreasonable interference with the use and enjoyment of the property of another." Asiala v. City of Fitchburg, 24 Mass. App. Ct. 13, 17 (1987). See also Tarzia v. Town of Hingham, 35 Mass. App. Ct. 506, 509-510 (1993). The common-law tort has no conceivable application to the facts of this case. A viable action under § 11 of Chapter 93A "requires that there be a commercial transaction between a person engaged in trade or commerce with another person engaged in trade or commerce." Szalla v. Locke, 421 Mass. 448, 451 (1995). As no business relationship existed between Sears and CNI, there can be no cause of action under § 11.

The remaining three Counts (I, II, and IV) share a common element. To prevail on any one or all of these claims, CNI must prove that Sear's conduct was intentional. Yet CNI has produced no evidence, direct or circumstantial, that Sears, a corporation with computer resources rivaling the Pentagon, intentionally invaded its modest server. While motive is not an element of CNI's claims, the question of motive is not altogether irrelevant. Why Sears, a retailer whose business in large part depends on effective internal and external communications, would choose to route its e-mail through a server that was incapable of delivering it, defies explication.[5]

Defendant's counsel at oral argument offered the most plausible explanation for the dead-ended e-mail messages. As it happens, Sears' internal e-mail system used a suffix for its customer care division that incorporated CNI's server address, that is, "@cnetwork.sears.com." If a sender omitted the "sears.com" suffix, the mail defaulted to

[5]As Sears points out, CNI has produced no evidence that any misaddressed e-mail was ever successfully sent or received through CNI's server.

CNI's server.[6] CNI has offered no evidence that the misrouted e-mail was caused by anything other than the similarity in addresses, or any evidence that Sears concocted a deliberate plan to access CNI's server. CNI speculates on possible reasons why Sears might have embarked on such an unfathomable course of conduct. But the time for definitive proof is now, and none has been produced.[7] "Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990). See also Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 581 (1st Cir. 1994) ("[M]otions for summary judgment must be decided on the record as it stands, not on litigants' visions of what the facts might some day reveal.").

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[6]Sears offers as an illustration (among others) an e-mail from Leon Trefler, an employee of Cambridge, Massachusetts-based Pegasystems, Inc., a consultant company to Sears, who sent an e-mail on April 23, 2001, to approximately 57 Sears employees, each with an attached PowerPoint presentation entitled "Horizontal Technology Direction Product Development: Evolving the Vision." Trefler typed correct addresses for 56 of the 57 intended recipients incorporating the suffix "@sears.com." But Trefler also included the addressee "thomas-frausto@cnetwork.com." This resulted in the message and its attachment being delivered to CNI's "@cnetwork.com" server. As no addressee "thomas-frausto" existed on the CNI server, the message was identified as undeliverable and forwarded to Webster's personal mailbox.

[7]At oral argument, CNI complained that Sears has not fully responded to its discovery requests. Although counsel stated that a motion to compel had been filed, no such motion appears on the docket. While the court had allowed CNI an enlargement of time to answer Sears' discovery requests, it insisted that "all written fact discovery must be completed in accordance with the Local Rules by 11/28/03, the date previously set by the court." It is far too late to wait until after summary judgment is heard to seek to reopen discovery into what appears in any event to be a dry well.

ORDER

For the foregoing reasons, Sears' motion for summary judgment is ALLOWED. The Clerk will enter judgment accordingly.

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE